Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
DQE Communications Network Services, LLC,	)	
Complainant,	)	File No. EB-05-MD-027
	)	
v.	)	
	)	
North Pittsburgh Telephone Company,	)	
Respondent.	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: February 2, 2007 **Released: February 2, 2007**

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we grant a Pole Attachment Complaint[1] filed by DQE Communications Network Services, LLC ("DQE CNS") against North Pittsburgh Telephone Company ("NPTC") pursuant to section 224 of the Communications Act of 1934, as amended ("the Act")[2] and sections 1.1401-1.1418 of the Commission's rules.[3] The Complaint alleges that NPTC violated section 224 by denying DQE CNS access to NPTC's poles, ducts, conduits, and rights-of-way for the placement of DQE CNS's attachments.[4] DQE CNS requests that the Commission order NPTC immediately to provide DQE CNS with "nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned and/or controlled by NPTC."[5] For the reasons stated below, we grant DQE CNS's Complaint and order NPTC to provide DQE CNS immediately with nondiscriminatory access to these facilities.

[1] Complaint of DQE Communications Network Services, LLC, File No. EB-05-MD-027 (filed Sep. 16, 2005) ("Complaint").

[2] 47 U.S.C. § 224.

[3] 47 C.F.R. §§ 1.1401-1.1418.

[4] *See*, *e.g.*, Complaint at 1-2, ¶¶ 1, 2.

[5] Complaint at 1, 10, ¶¶ 1, 29. For ease of reference, "poles" or "pole attachments" discussed herein refer to all facilities and properties owned and/or controlled by NPTC that are the subject of DQE CNS's request for access under section 224.

II. FACTUAL AND REGULATORY BACKGROUND

2. DQE CNS is authorized by Certificate of Public Convenience issued by the Pennsylvania Public Utility Commission ("PaPUC") to "offer, render, furnish, or supply telecommunication services as a Competitive Access Provider, to the Public, in the Commonwealth of Pennsylvania."[6] DQE CNS offers "telecommunications services . . . to business customers for the origination and termination of telecommunications between points within" Pennsylvania under the terms specified in the "Competitive Access Provider Tariff" ("CAP Tariff" or "Tariff") DQE CNS published and filed with the PaPUC on December 2, 2004.[7] Section 3 of the Tariff describes the services DQE CNS offers as (i) "Dedicated Transport Services (ICB)," including DS3 Service, T1 Service (1.544 Mbps), 10 Mbps-100-1000 Gbps Ethernet services in increments of 1 Mbps; (ii) "Other Services," including "point-to-point high-speed Internet access, network management services, digital point-to-point services as well as redundant ring topology;" and (iii) "Individual Case Basis (ICB) Arrangements," including arrangements "developed on a case-by-case basis in response to a bona fide special request from a Customer."[8]

3. NPTC is an incumbent local exchange carrier providing telecommunications within the Commonwealth of Pennsylvania, and thus is a "utility" within the meaning of section 224(a)(1) of the Act.[9] As a "utility," NPTC must provide "a cable television system *or any telecommunications carrier*" with "nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it,"[10] unless it can show that a denial of access is justified due to "insufficient capacity" or "for reasons of safety, reliability and generally applicable engineering purposes."[11]

4. On July 20, 2005, DQE CNS sent a letter to NPTC requesting access to NPTC's poles via a pole attachment agreement, and describing DQE CNS as a carrier that "provides telecommunications services in Southwestern Pennsylvania."[12] In an August 19, 2005 response, NPTC asserted that, because DQE CNS provides various private line services, DQE CNS is not a "telecommunications carrier"

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[6] *Id.* at 2, ¶¶ 4-5; Exhibit 1, Pennsylvania Public Utility Commission, In the Matter of the Application of: A-311233, Application of DQE CNS Communications Network Services, LLC for approval of the right to begin to offer, render, furnish, or supply telecommunication services as a Competitive Access Provider, to the Public, in the Commonwealth of Pennsylvania, Certificate of Public Convenience, November 18, 2004 ("Certificate of Public Convenience").

[7] *Id.* at 3, ¶ 6; Exhibit 2 at 7, Section 2.1.A., DQE CNS Communications Network Services, LLC, Competitive Access Provider Tariff, PA P.U.C. Tariff No. 1, Effective December 03, 2004 ("CAP Tariff" or "Tariff").

[8] *Id.*, Exhibit 2 at 22, Sections 3.1-3.4.

[9] *Id.* at 3, ¶¶ 8-10; Response at 5, ¶¶ 8-10. Section 224(a)(1) of the Act defines "utility," in pertinent part, as "a local exchange carrier … who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." 47 U.S.C. § 224(a)(1).

[10] 47 U.S.C. § 224(f)(1) (emphasis added). *See* 47 U.S.C. § 224(a)(4) (defining "pole attachment" as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility"). *See also National Cable & Telecommunications Association, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002) ("*NCTA v. Gulf Power*").

[11] 47 U.S.C. § 224(f)(2).

[12] Complaint at 4, ¶¶ 11-12; Exhibit 5, Letter dated July 20, 2005, from David S. Weber, General Manager, Sales, DQE CNS Communications, to Kevin Albaugh, Vice President, Regulatory Affairs, North Pittsburgh Telephone Company ("DQE CNS July 20 Letter"); Response at 5-6, ¶¶ 11-12.

entitled to access NPTC poles under the Act.[13] In a responding letter dated August 24, 2005, DQE CNS disputed NPTC's assertions, but was unsuccessful in persuading NPTC to grant its request for a pole attachment agreement. [14]

5. On September 16, 2005, promptly after being denied access, DQE CNS filed the instant Complaint alleging that NPTC has denied DQE CNS access to its poles in violation of section 224 of the Act, and requesting that the Commission order NPTC to provide DQE CNS immediate access to NPTC's poles. In its Response to the Complaint, NPTC acknowledges that it has denied DQE CNS's request for pole access, but argues that DQE CNS is not entitled to such access under section 224 of the Act because it has not demonstrated that it is a "telecommunications carrier" planning to provide "telecommunications services" over the requested attachments, as those terms are defined in the Act.[15]

6. As the foregoing discussion reveals, the key question presented by DQE CNS's Complaint is whether DQE CNS is a "telecommunications carrier" with statutory access rights to NPTC's poles under section 224(f)(1) of the Act.[16] Answering that question requires examination of certain statutory and common law definitions described below.

7. The Act defines "telecommunications carrier," in pertinent part, as "any provider of telecommunications services . . ." and specifies that "[a] telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services."[17] The term "telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of facilities used."[18] "Telecommunications" is defined as "the transmission, between

[13] Complaint at 4, ¶ 13; Exhibit 6, Letter dated August 19, 2005, from Kevin Albaugh, Vice President, Regulatory Affairs, North Pittsburgh Telephone Company to David S. Weber, General Manager, Sales, DQE CNS Communications, LLC ("NPTC August 19 Letter"); Response at 7-8, ¶ 13.

[14] Complaint at 5, ¶¶ 15-16; Exhibit 7, Letter dated August 24, 2005, from David H. Pawlik, Counsel to Duquesne Light Holdings, Inc., to Kevin Albaugh, Vice President, Regulatory Affairs, North Pittsburgh Telephone Company, Re: DQE CNS Communications Network Services, LLC Request for Attachment to Poles ("DQE CNS August 24 Letter") at 2-3; Exhibit 8, E-mail from John Alzamora, Counsel to North Pittsburgh Telephone Company (acknowledging receipt of DQE CNS August 24 Letter); Response at 8-9, ¶¶ 15-16.

[15] *See*, *e.g.*, Response at 7-17, ¶¶ 15, 19, 21, 30-54.

[16] Although section 224(f)(2) explicitly permits denial of access "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes," 47 U.S.C. § 224(f)(2), NPTC's denial of access does not rest on any of these grounds, but rather solely on NPTC's contention that DQE CNS is not a "telecommunications carrier" with a right of access under section 224(f)(1).

[17] 47 U.S.C. § 153(44).

[18] *Id.* at § 153(46). We note that the Act defines "telecommunications carrier" as any "*provider* of telecommunications service," and defines "telecommunications service" as the indiscriminate "*offering* of telecommunications." *See* 47 U.S.C. §§ 153(44) and (46) (emphases supplied). These two definitions, read together, indicate that a "telecommunications carrier" is a carrier that *offers* to supply telecommunications on a common carrier basis, regardless of whether the carrier has actually supplied such service to a customer in the past. To read this statutory language as requiring a carrier to have already supplied such services to customers in order to qualify as a "telecommunications carrier" would lead to the nonsensical result that a facilities-based provider could never establish its identity as a telecommunications carrier for purposes of, for example, pole attachments under section 224(f)(1) unless it was already supplying telecommunications service to the public, which might not even be possible without access to the poles.

or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[19]

8. In interpreting those statutory definitions, the D.C. Circuit affirmed the Commission's conclusions that the term "telecommunications service" "is intended to encompass only telecommunications provided on a *common carrier* basis,"[20] and (ii) the term "telecommunications carrier," which was added to the Act in 1996, has essentially the same meaning as the pre-existing term "common carrier."[21] Courts construing "common carrier" have held, *inter alia*, that "the primary *sine qua non* of common carrier status is a quasi-public character, which arises out of the undertaking to carry for all people indifferently;" and a "second prerequisite to common carrier status'" is that "'customers transmit intelligence of their own design and choosing."[22] Such offering of service indiscriminately to the public may be either a wholesale offering to other carriers or a retail offering to end users.[23]

9. A "telecommunications carrier" offering to provide telecommunications service over a pole attachment may also offer to provide one or more *non*-telecommunications services over its pole attachments, without losing its right of access under section 224(f)(1) of the Act. In *NCTA v. Gulf Power*, the Supreme Court concluded, in a case involving a cable system attacher, that the protections of section 224 extend to attachments by cable systems that are simultaneously used to provide cable service and high-speed Internet access.[24] The Court reasoned that an attachment of a cable television company providing only cable service is an "attachment by a cable television system," subject to section 224, and that the addition of another service, such as Internet access service, "does not change the character of the attaching entity – the entity the attachment is 'by.'" "And this," declared the Court, "is what matters under the statute."[25] Likewise, an entity that has established its status as a telecommunications carrier

[19] 47 U.S.C. § 153(43).

[20] *Virgin Islands Tel. Co. v. FCC*, 198 F.3d 921, 927-30 (D.C. Cir. 1999) ("*Vitelco*") (emphasis added) (affirming *AT&T Submarine Sys., Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 21585 (1998)).

[21] *Vitelco*, 198 F.3d at 924-27. *See*, *e.g.*, *Cable & Wireless plc,* Memorandum Opinion and Order, 12 FCC Rcd 8516, 8521-23, at ¶¶ 12-17 (1997); *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9177-78, at ¶ 785 (1997) (subsequent history omitted) ("*Universal Service Order*"). The Act defines "common carrier" or "carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio ...." 47 U.S.C. § 153(10).

[22] *Southwestern Bell Telephone Co. v. Federal Communications Commission*, 19 F.3d 1475, 1480 (D.C. Cir. 1994) (quoting *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir.1976) (internal quotes and footnotes omitted)); *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 992 (1976).

[23] *See*, *e.g.*, *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11556, at ¶ 115 (1998) ("*Universal Service Report to Congress*"); *Universal Service Order*, 12 FCC Rcd at 9177-78, ¶ 785 (holding that users of common carrier services are not limited to end users; "[c]ommon carrier services include services offered to other carriers, such as exchange access service, which is offered on a common carrier basis, but is offered primarily to other carriers"). *See generally MTS and WATS Market Structure, Phase I*, Third Report and Order, 93 FCC 2d 241, 246-47, 249-50, ¶¶ 13-14, 23 (1983) ("*MTS/WATS Market Structure Order*") (stating that access charges are regulated services and include "carrier's carrier" services).

[24] *NCTA v. Gulf Power*, 534 U.S. at 330.

[25] *Id.* at 333. *See generally Heritage Cablevision Assocs. of Dallas. L.P. v. Texas Util. Elec. Co.*, Memorandum Opinion and Order, 6 FCC Rcd 7099, 7104, ¶ 23, *recon. dismissed*, 7 FCC Rcd 4192 (1992), *aff'd sub nom. Texas Util. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993) (holding that cable system does not lose its pole attachment rights when it is also used to provide non-cable services on a commingled basis).

with a right of access under section 224(f) by offering to provide a telecommunications service over a requested attachment does not lose that status by offering non-telecommunications services over the same attachment.

III. DISCUSSION

A. DQE CNS Has Established a *Prima Facie* Case That It Is a "Telecommunications Carrier" with a Right of Access to NPTC's Poles Under Section 224(f)(1) of the Act

10. In a case such as this challenging a denial of access, section 1.1409(b) of our rules provides that the complainant bears the burden of establishing a *prima facie* case that the denial of access violates section 224(f) of the Act.[26] Once the complainant establishes a *prima facie* case, the defendant utility has the burden of proving that its denial was lawful.[27] Therefore, DQE CNS bears an initial burden to establish a *prima facie* case that it is a "telecommunications carrier" with a right of access within the meaning of the Act. As discussed below, we conclude that DQE CNS has met that burden by showing that it possesses a valid state authorization to provide telecommunications services, and has filed a state tariff offering such services to the public.

11. Specifically, we find that the decisions of the PaPUC to issue a Certificate of Public Convenience authorizing DQE CNS to "offer, render, furnish, or supply *telecommunications services* as a Competitive Access Provider ["CAP"], to the Public, in the Commonwealth of Pennsylvania,"[28] and to allow DQE CNS to publish a CAP Tariff offering such services to the public,[29] reflect judgments by an expert regulatory agency that the services set forth in DQE CNS's Tariff constitute "telecommunications services." Moreover, NPTC has not identified any material differences between the meaning of the terms "telecommunications carrier" and "telecommunications service" under Pennsylvania law and the definitions of those terms in the Act; and we are aware of none. Accordingly, DQE CNS may rely on the PaPUC's authorizations to offer to provide "telecommunications service" to establish its *prima facie* case under section 224(f)(1) of the Act.[30]

12. In assessing DQE CNS's proof of its status as a "telecommunications carrier" with pole attachment rights under section 224(f) under the Act, our reliance on the PaPUC's decisions finds support in cases addressing the prerequisites for the analogous process of establishing an entity's status as a "cable television system" with pole attachment rights under section 224(f). In *Paragon Cable Television Inc. v. FCC,* the D.C. Circuit upheld a Commission ruling that possession of a valid cable franchise is a reasonable precondition for pole attachments. In so holding, the D.C. Circuit found that the Commission

[26] 47 C.F.R. § 1.1409(b).

[27] *Id.*

[28] Complaint at 7, ¶ 21; Exhibit 1 (emphasis supplied).

[29] *See id.* at 2-3, ¶¶ 5, 6; 7-8, ¶¶ 21-24; Exhibits 1, 2, and 3.

[30] We leave open the possibility that a state may define either "telecommunications carrier" or "telecommunications service" under state law in a manner so inconsistent with the definitions contained in sections 153(44) and 153(46) of the Act such that an entity could obtain state certification and file state tariffs, yet not meet those federal statutory definitions. Similarly, a state might authorize an entity to provide telecommunications services only in some, but not all, portions of a state such that additional evidence of the entity's status would be required to demonstrate a right of attachment in those non-certificated portions of the state. Neither situation, however, exists in this case, as far as our record shows.

could apply a "presumption of validity" to decisions by the local franchising authority concerning the attacher's status as an approved franchisee.[31] Similarly, in *Texas Util. Elec. Co v. FCC*, the D.C. Circuit upheld a Commission ruling that section 224 of the Act conferred jurisdiction over those pole attachments within the franchise service area defined by the local franchise authority.[32] These cases suggest that attachers are entitled to rely on decisions by responsible regulatory agencies, such as franchise authorities in the case of cable system attachers, and public utility commissions in the case of telecommunications carriers, in establishing their status as entities entitled to access under section 224(f) of the Act.[33]

13. Based on the foregoing, we conclude that DQE CNS's possession of a valid state authorization to provide telecommunications services, together with its associated state tariff filing, constitutes presumptive evidence of its status as a "telecommunications carrier" within the meaning of the Act. In our view, therefore, DQE CNS has made a *prima facie* showing that it is a "telecommunications carrier" entitled to nondiscriminatory access to NPTC's poles under section 224(f)(1) of the Act. Nevertheless, to avoid disputes such as this, and to expedite the pole attachment process, we encourage entities seeking pole attachments for the first time to provide to the utility sufficient information at the outset to establish their right to attach. Moreover, although a utility may inquire as to whether the would-be attacher is, in fact, planning to operate as a telecommunications carrier offering some telecommunications service within the utility's service area, the utility must accept reasonable attempts to answer its inquiries. This is particularly true where, as here, the requesting entity possesses a state regulatory authorization to provide telecommunications services pursuant to tariff throughout the state, and a clearly worded inquiry on the part of the utility would have likely elicited the desired information.[34]

[31] *Paragon Cable Television Inc. v. FCC*, 822 F.2d 152, 153-54 (D.C. Cir. 1987) (holding that the Commission properly refused to address the attacher's arguments challenging the legality of the franchise authority's decision to revoke the attacher's franchise, noting that it was appropriate for the Commission to employ a "presumption of validity with respect to the franchising authority's actions *vis-à-vis* the franchise"). *See id*. at 154 & n.2 (citing *Tele-Communications, Inc. v. South Carolina Elec. & Gas Co.*, File No. PA-83-0027 (Com. Car. Bur. Apr. 19, 1985) (holding that the utility could not substitute its judgment for the franchising authority by removing pole attachments before such time as the franchising authority's revocation actually took effect)).

[32] *Texas Util. Elec. Co v. FCC*, 997 F.2d 925, 934-35 (D.C. Cir. 1993).

[33] Moreover, NPTC does not argue that it lacked adequate recourse at the state level if it believed that the PaPUC erred either in issuing DQE CNS its Certificate of Public Convenience, or in accepting DQE CNS's CAP Tariff for filing. *See* Response, Exhibit 1, Certificate of Public Convenience, at 2 ("The Applicant complied with notice requirements set forth in our Implementation Orders. No Protests were filed. No hearings were held."); 52 Pa. Code § 54.36 (procedure for protests to applications); 52 Pa. Code § 5.572 (procedures for petitions for relief following a final decision).

[34] NPTC faults DQE CNS for failing, in its letters requesting pole attachments, to identify with specificity the particular telecommunications services it intends to provide over the requested pole attachments. Response at 7-9, ¶¶ 13, 15. *See* Complaint at Exhibits 4 and 5. Even if DQE CNS's letters were vague, however, that problem was certainly cured by DQE CNS's submissions here, and thus cannot serve as a basis for NPTC's continuing denial of access. In any event, the applicable rule does not mandate any particular level of specificity about the services to be provided over the requested attachments, *see* 47 C.F.R. § 1.1403; and NPTC apparently knew about DQE CNS's Tariff and Certificate of Public Convenience. *See* Complaint, Exhibit 6 at 2.

B. NPTC Has Failed to Show That Its Denial of Access Was Lawful

14. Because DQE CNS has established a *prima facie* case, the burden shifts to NPTC to demonstrate that its denial of access was lawful.[35] NPTC argues that it lawfully denied access to DQE CNS because DQE CNS purportedly does not qualify as a "telecommunications carrier" with a right of attachment under section 224(f).[36] We conclude that NPTC has failed to show that DQE CNS is not a "telecommunications carrier" under the Act, and thus it cannot justify its denial of access on that basis.

1. DQE CNS's Tariffed Private Line Services Offered On An "ICB" Basis Are "Telecommunications Services" Under the Act

15. NPTC argues that DQE CNS is not a "telecommunications carrier" entitled to pole access because DQE CNS's tariffed private line services -- including dedicated transport services, Internet access, network management, point-to-point transport service, redundant (Ethernet) ring topology, and other ICB services -- are not "telecommunications services" within the meaning of the Act.[37] NPTC also maintains that DQE CNS's offer of private line or other service under ICB arrangements disqualifies DQE CNS from being a "telecommunications carrier" because an ICB offering *per se*, "does not constitute the offer of telecommunications directly to the 'public' [under the Act]."[38] NPTC fails, however, to offer any relevant facts, legal arguments, or authorities to support either of these arguments. We therefore reject NPTC's contentions, and conclude that DQE CNS's tariffed private line services are "telecommunications services" within the meaning of section 153(46) of the Act.[39]

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[35] 47 C.F.R. § 1.1409(b).

[36] Response at 7-8, ¶ 13 (citing NPTC August 19 Letter at Complaint, Exhibit 6); 13-18, ¶¶ 30-54. In correspondence with DQE CNS, NPTC referenced DQE CNS's purported plans to offer "dark fiber" for lease as an additional reason for denying DQE CNS access to its poles. August 19 Letter (Complaint, Exhibit 6) at 2. According to NPTC, offering dark fiber for lease is not a "telecommunications service," and thus the installer of dark fiber is not a "telecommunications carrier" within the meaning of the Act. *Id.* The only reference to the dark fiber issue in this proceeding appears in two paragraphs in NPTC's Response that cite to the arguments it raised in the August 19, 2005 Letter. *See* Response at 7, ¶ 13; 10, ¶ 17. Thus, it is not clear whether NPTC intended to raise the dark fiber issue in this proceeding as a justification for its denial of access. In any event, in light of our findings that DQE CNS is a telecommunications carrier providing or offering other telecommunications services, we need not address the allegations concerning providers of dark fiber. *See* Section II, ¶ 9, *supra* (explaining that an entity offering a telecommunications service does not lose its status as a telecommunications carrier by also offering a non-telecommunications service).

[37] Response at 16, ¶¶ 46-47. We discuss NPTC's claim concerning the provision of high-speed internet access under DQE CNS's Tariff in Section III.B.3, *infra*.

[38] Response at 17, ¶ 52-53; *see id.* at 10-11, ¶ 21. Although NPTC fails to elaborate or cite any authorities in support of its argument, we interpret its Response as an assertion that ICBs are *per se* inconsistent with common carrier status because of their individualized nature.

[39] 47 U.S.C. § 153(46); *see id.* at § 153(44). The Commission has stated that "an entity offering a simple, transparent transmission path, without the capability of providing enhanced functionality, offers 'telecommunications.'" *Universal Service Report to Congress*, 13 FCC Rcd at 11520, ¶ 39. The private line services at issue here offer a simple, transparent transmission path for information of the user's choosing, without the capability of providing enhanced functionality. *See*, *e.g.*, Complaint, Exhibit 2 at Original Page 22. *See generally Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, 15989, at ¶ 922 (1996) (subsequent history omitted) (stating that "to the extent a

(continued.…)

16. By offering its dedicated (*i.e.*, private line) transport service and digital point-to-point services via its Tariff, DQE is holding itself out to the public as providing those services indifferently and "indiscriminately" for a fee; [40] moreover, those services involve communications by wire and transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.[41] Indeed, the Commission has long regulated as common carrier services the provision of "private line" services,[42] which the Commission defines as "facilities or network transmission capacity dedicated to the use of an individual customer."[43] For example, the Commission's rules contain general guidelines and rate structure requirements for the tariffed private line services of dominant common carriers.[44] Moreover, the Commission classifies interstate private line services as interstate telecommunications for purposes of universal service contributions.[45] The Commission thus has recognized that private line services may be offered on a common carrier basis, and treats private line services offered under tariff as common carrier offerings. Accordingly, the fact that DQE CNS offers dedicated or "private line" services provides no

(…continued from previous page)
carrier is engaged in providing for a fee domestic or international telecommunications, directly to the public or to such classes of users as to be effectively available directly to the public, the carrier falls within the definition of 'telecommunications carrier'").

[40] Complaint, Exhibit 1, DQE CNS PaPUC CAP Certificate of Public Convenience; Exhibit 2, DQE CNS CAP Tariff, Section 2.1.A (tariff regulations and rates for intrastate telecommunications offered to business customers within the state, without restriction, subject only to availability of facilities and services).

[41] Complaint, Exhibit 1, Exhibit 3 (Declaration of David S. Weber) at 2, ¶¶ 6-7; Reply of DQE Communications Network Services, LLC, File No. EB-05-MD-027 (filed Nov. 7, 2005) ("Reply") at 2, ¶ 3. Section 3 of DQE CNS's CAP Tariff, Description of Services, contains three categories of services: (1) "Dedicated Transport Services (ICB), which includes DS3 Service, T-1 service (1.544 Mbps) and 10 Mbps-100-1000 Gbps Ethernet services in increments of 1 Mbps; (2) Section 3.2, "Other Services," which includes "point-to-point high-speed internet access, network management services, digital point-to-point services, as well as redundant ring topology;" and (3) Section 3.4, "Individual Case Basis (ICB) Arrangements," which offers service arrangements on a case-by-case basis in response to "a bona fide special request from a Customer or prospective Customers to develop a bid for a service not generally available under this tariff." Complaint, Exhibit 2 at Original Page 22. As DQE CNS observed in its August 24 Letter to NPTC, the term "private" in this context refers to the customer, not the carrier. Complaint, Exhibit 7 at 3.

[42] *See*, *e.g.*, *Investigation of Special Access Tariffs of Local Exchange Carriers,* Memorandum Opinion and Order, 8 FCC Rcd 4712, 4712, at ¶ 2 (1993) ("*Special Access Tariff Investigation*"); *MTS and WATS Market Structure Order,* 93 FCC 2d at 249-50, at ¶¶ 20-23; *American Telephone & Telegraph Company; Private Line Rate Structure and Volume Discount Practices*, Notice of Inquiry and Proposed Rulemaking, 74 FCC 2d 226 (1979) (investigating whether the pricing of AT&T's competitive private line services was consistent with 47 U.S.C § 202, which prohibits unjust discrimination by common carriers).

[43] *Special Access Tariff Investigation*, 8 FCC Rcd 4712, at ¶ 2.

[44] 47 C.F.R. § 61.40 (providing rate structure requirements for the tariffed private line services of dominant common carriers); *Access Charge Reform,* Fifth Report and Order, 14 FCC Rcd 14221 (1999) (establishing pricing flexibility rules for incumbent local exchange carrier ("ILEC") common carrier special access – interstate private line – services, including circumstances in which ILECs may offer such services on an individually tailored "contract tariff' basis), *aff'd sub nom. WorldCom v. FCC*, 238 F.3d 449 (D.C. Cir. 2001); *see Special Access Tariff Investigation*, *supra* notes 42-43 (investigating certain issues related to duration of the Other Common Carrier (OCC) Rate Equalization Plan adopted in connection with replacing local private line services provisioned under tariff by AT&T prior to the advent of effective special access tariffs).

[45] *Universal Service Order*, 12 FCC Rcd at 9175, ¶ 780.

basis for NPTC's assertion that DQE CNS is not a "telecommunications carrier" with pole attachment rights under section 224(f)(1) of the Act.[46]

17. We also reject NPTC's argument that DQE CNS's offer of services on an "ICB" basis inherently disqualifies it from the status of a telecommunications carrier. That argument assumes that the act of customizing a telecommunications offering, rather than the nondiscriminatory availability of a particular offering, is determinative of whether the offering constitutes a telecommunications service. NPTC has not cited a single authority holding that an entity failed to qualify as a common carrier solely because it offered services on an individual case basis, and we are aware of none. In fact, the Commission has treated ICB offerings as common carrier offerings subject to Title II of the Act.[47] Moreover, DQE CNS represents that it "offers services on an 'individual case basis' but will provide the same or similar services to all customers with nondiscriminatory rates and terms of service."[48] NPTC has not identified any specific features of DQE CNS's ICB offering that would undermine DQE CNS's status as a common carrier. On the contrary, DQE CNS's tariff makes clear that DQE CNS is offering ICB services indiscriminately to the public.[49] Thus, although its initial private line services are being offered on a case-by-case basis, DQE CNS is pledging, publicly, through Section 3.4.A., to price its

[46] In its August 19 Letter explaining its reasons for denying DQE CNS access to its poles, NPTC cites DQE CNS's lack of certification by the PaPUC as a "CLEC." Complaint, Exhibit 6 at 1; Response at 7, ¶ 13; 10, ¶ 17. If NPTC is thereby contending that it may deny pole access to DQE CNS merely because it is certified as a "CAP" rather than as a "CLEC," we soundly reject that position. For the reasons described above, the "Competitive Access Provider" services listed in DQE CNS's CAP Tariff plainly qualify as "telecommunications services" under the Act. Moreover, through its CAP Tariff, DQE CNS holds itself out to provide the listed telecommunications services indiscriminately to the public, for a fee. Thus, the fact that DQE CNS is a "CAP" rather than a "CLEC" provides no lawful basis under the Act for NPTC to deny DQE CNS access to NPTC's poles.

[47] *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 17 FCC Rcd 16960, 16963-64, at ¶¶ 10-11 (2002) ("*2002 Advanced Services Order*"), *citing Southwestern Bell Telephone Company Tariff F.C.C. No. 73*, Order Designating Issues for Investigation, 12 FCC Rcd 10231, 10242, at ¶ 20 (1997) ("*SWBT Tariff No. 73 Investigation*"); *Local Exchange Carriers' Individual Case Basis DS3 Service Offerings*, Memorandum Opinion and Order, 4 FCC Rcd 8634, 8641-42, 8645, at ¶¶ 63-67, 87 (1989) ("*ICB DS3 Rate Order*"); *Common Carrier Bureau Restates Commission Policy on Individual Case Basis Tariff Offerings*, Public Notice, 11 FCC Rcd 4001 (1995) ("*ICB Public Notice*"). *See also MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 38 (D.C. Cir. 1990) (rates arrived at through negotiations between a carrier and an individual customer and then made generally available to other similarly situated customers do not *per se* violate section 202 of the Act if the rates are filed with the FCC as tariffs based upon contracts).

[48] Reply, Weber Declaration at 1-2, ¶ 5. *See* Complaint, Exhibit 2 at 22 DQE CNS CAP Tariff, Section 3.4.A ("ICB rates will be offered to the Customer in writing and on a non-discriminatory basis. All such rates will be submitted to the Pennsylvania Utility Commission for approval."). We note that the record also supports the assertion by DQE CNS that it is a nascent carrier in NPTC's territory, lacking sufficient experience to develop averaged rates. Reply, Weber Declaration at 1-2, ¶ 5. *See generally 2002 Advanced Services Order*, 17 FCC Rcd at 16963-64, at ¶¶ 10-11; *ICB Public Notice*, 11 FCC Rcd at 4001-02 (stating that an ICB service offering by a dominant carrier may not be unreasonably discriminatory when used as a transitional mechanism).

[49] DQE CNS's ICB arrangements are described in Section 3.4.A of the Tariff as follows: "Arrangements will be developed on a case-by-case basis in response to a bona fide special request from a Customer or prospective Customer to develop a competitive bid for a service not generally available under this tariff. ICB rates will be offered to the Customer in writing and on a non-discriminatory basis. All such rates will be submitted to the Pennsylvania Utility Commission for approval." Complaint, Exhibit 2 at Section 3.4.A.

services on a non-discriminatory basis and submit its rates to the PaPUC for approval.[50] Based on this record, NPTC has failed to meet its burden of proving that DQE CNS's tariffed offering of private line service on an ICB basis prevents DQE CNS from qualifying as a "telecommunications carrier" with pole access rights under section 224(f)(1) of the Act.[51]

2. DQE CNS's Tariffed Services Involve "Transmission" of Information

18. NPTC asserts that, under the Act, "telecommunications" must involve "transmission" of messages.[52] NPTC contends that DQE CNS does not "transmit messages," and therefore cannot be deemed a provider of "telecommunications services" under the Act.[53] NPTC's contention rests solely on language in DQE CNS's CAP Tariff Section 2.2.D., which states: "Carrier does not transmit messages pursuant to this Tariff, but its services may be used for that purpose."[54] We conclude, based on an examination of the Tariff as a whole, that DQE CNS does, in fact, offer to transmit information of the user's choosing through its CAP Tariff, and thus qualifies as a "telecommunications carrier" under the Act.

19. Section 2.1.A of the CAP Tariff states: "This Tariff contains the regulations and rates applicable to intrastate telecommunications services provided by Carrier [DQE CNS] to business customers for the origination and termination of telecommunications between points within the State."[55] Section 1 defines "Telecommunications" as the "*transmission* of voice communications or, subject to the *transmission* capabilities of the service, the *transmission* of data, facsimile, signaling, metering, or other similar communications."[56] Moreover, most (if not all) of the services described in Section 3 of the Tariff -- including, for example, DS3 Service, T-1 service, and digital point-to-point services -- plainly involve transmission of the user's information.[57] Given this context, we interpret Tariff Section 2.2.D. as indicating simply that DQE CNS does not transmit messages *of its own*, but rather transmits only the messages of its customers. To hold otherwise would effectively nullify all of the many terms and conditions in the Tariff that demonstrate DQE CNS's offering of telecommunications service.

20. Buttressing our conclusion is DQE CNS's explanation that it included the language at issue in Tariff Section 2.2.D merely because such provisions are commonly found in other tariffs

[50] How well DQE CNS meets its obligations as an intrastate telecommunications common carrier is a matter for the PaPUC to determine. We express no view on either the correct interpretation or lawfulness *per se* of DQE CNS's CAP Tariff. We examine its terms and conditions in this Order solely for the purpose of determining DQE CNS's status as a "telecommunications carrier" entitled to access NPTC's poles under section 224.

[51] As noted previously, NPTC has adequate recourse at the state level if it believes the PaPUC erred either in issuing DQE CNS its Certificate of Public Convenience, or in accepting DQE CNS's CAP Tariff for filing. *See supra* note 33.

[52] 47 U.S.C. § 153(43). *See* Response at 10, ¶ 19.

[53] 47 U.S.C. § 153(44). *See* Response at 10, ¶ 19 and 13-14, ¶ 30-36.

[54] Complaint, Exhibit 2 at 8, Section 2.2.D. *See* Response at 14, ¶ 36.

[55] Complaint, Exhibit 2 at 7, Section 2.1.A.

[56] Complaint, Exhibit 2 at 6, Section 1 (emphasis supplied).

[57] Complaint, Exhibit 2 at 22.

approved by the PaPUC.[58] Indeed, as DQE CNS has noted, similar tariff provisions appear in the Pennsylvania tariffs filed by several other common carriers, including NPTC itself.[59]

21. We therefore reject NPTC's suggestion that Section 2.2.D. of DQE CNS's Tariff disclaims the transmission of information. Accordingly, Section 2.2.D provides no basis for NPTC's assertion that DQE CNS is not a "telecommunications carrier" with pole access rights under section 224(f)(1) of the Act.

3. DQE CNS Offers Broadband Internet Access Transmission on a Common Carriage Basis

22. NPTC argues that, insofar as DQE CNS is offering "high speed Internet access" service under its Tariff,[60] DQE CNS is offering an "information service," not a "telecommunications service," and thus is not a "telecommunications carrier" with pole access rights under section 224(f)(1) of the Act. We find that NPTC has no legal or factual or basis for denying DQE CNS access on these grounds. As an initial matter, we note that DQE CNS qualifies as a telecommunications carrier under the Act based on the various telecommunications service offerings discussed above, and DQE CNS would not lose that status if it were to offer an information service in addition to these telecommunications services.[61] Moreover, as explained below, NPTC has failed to show that DQE CNS actually offers an information service in NPTC's territory. Although DQE CNS's Tariff includes a service called "high speed Internet access," an examination of the record shows that this service is actually a "telecommunications service."

23. NPTC is correct that the Commission has classified as "information service" an integrated service that combines transmission with the data storage, manipulation, processing, and retrieval portion, *i.e.*, the Internet service provider ("ISP") portion, of an Internet access service.[62] The

[58] Reply at 5, ¶ 6.

[59] *Id.* at 5, ¶ 6 (citing Armstrong Telephone Company – Pennsylvania, PA P.U.C. No. 10, Governing the Furnishing of Telephone Service in Allegheny, Beaver, and Washington Counties, § 2.3.5 ("Except as otherwise specifically provided in this tariff, the Company does not transmit messages but offers the use of its facilities for communications between customers."); NPTC PA P.U.C. Tariff No. 12, § 2.1.1 (A) ("The Telephone Company does not undertake to transmit messages under this Tariff ....")).

[60] *See* Complaint, Exhibit 2 (CAP Tariff) at Page 22, Section 3.2 (listing as "Other Services:" "point-to-point high-speed internet access, network management services, digital point-to-point services, as well as redundant ring topology. . ."). *See also* Response at 16, ¶ 47. The Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20).

[61] *See NTCA v. Gulf Power*, 534 U.S. 327 (holding, in an analogous context, that the protections of section 224 continue to apply to attachments by cable systems, even if the attachments are simultaneously used to provide both cable service and a non-cable service, such as high-speed Internet access).

[62] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4821-23, at ¶¶ 36-38 (2002) ("*Cable Modem Declaratory Ruling*"); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, *Universal Service Obligations of Broadband Providers, Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III*
(continued.…)

ISP portion of an Internet access service typically provides end users with a comprehensive capability for manipulating information using the Internet, including applications such as web browsing, file transfers, e-mail access, Usenet newsgroups, and Domain Name System access.[63] The Commission has also recognized that the "telecommunications" component of an Internet access service can be "part and parcel"[64] of an integrated Internet access service offering, or it can be offered separately from the ISP portion of the service and consist solely of a transparent transmission path, with no changes to the form or content of the transmitted information.[65] Carriers can choose to offer this transmission component as a telecommunications service on a stand-alone, wholesale, common carrier basis to ISPs, who then use that service as an input for the wireline broadband Internet access that the ISPs, in turn, offer to their own end-user customers.[66] Given the foregoing, the Commission has held that whether a service is a "telecommunications service" or an "information service" turns on the nature of the functions the purchaser is offered.[67] The determinative question, briefly put, is: does the service offering involve only a transparent transmission path, with no changes to the form or content of the transmitted information; or does it involve data storage, manipulation, processing, and retrieval?

24. Applying that standard here, we find that the high-speed Internet access service that DQE CNS offers through its Tariff is a "telecommunications service," not an "information service." Although the single phrase "high speed Internet access" in DQE CNS's Tariff, standing alone, might suggest an offering of data storage, manipulation, processing, and retrieval services, we find such an interpretation unreasonable in the context of the Tariff as a whole. First, Section 2.1.A. notes that the Tariff encompasses the "intrastate telecommunications services provided by [DQE CNS] to business customers for the origination or termination of telecommunications between points within the State.[68] Section 1 defines the "Telecommunications" offered as the "transmission of voice communications or, subject to the transmission capabilities of the service, the *transmission of data, facsimile, signaling, metering, or other similar communications.*"[69] Nowhere in the Tariff does DQE CNS offer the ISP portion of Internet

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and ONA Safeguards and Requirements, Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling, or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14863-64, at ¶¶ 14-15 (2005) ("*Wireline Broadband Order*").

[63] *See*, *e.g.*, *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 125 S.Ct. 2688, 2702-12 (2005) ("*Brand X*") (affirming *Cable Modem Declaratory Ruling*, *supra* note 62); *Wireline Broadband Order*, 20 FCC Rcd at 14863-64, ¶¶ 14-15; *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4821-22, ¶¶ 36-38; *Universal Service Report to Congress*, 13 FCC Rcd at 11537-39, ¶¶ 76-78.

[64] *Wireline Broadband Order*, 20 FCC Rcd at 14911, ¶ 104.

[65] *See Wireline Broadband Order*, 20 FCC Rcd at 14901, 14909-10, ¶¶ 90, 103; *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4822-25, ¶¶ 38, 41-43; *Universal Service Report to Congress*, 13 FCC Rcd at 11520-21, ¶¶ 39-41.

[66] *See Wireline Broadband Order*, 20 FCC Rcd at 14909-10, ¶ 103.

[67] *See Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4821, ¶ 35; *Universal Service Report to Congress*, 13 FCC Rcd at 11530, ¶ 59 (noting "Congress's direction that the classification of a provider should not depend on the type of facilities used ... [but] rather on the nature of the service being offered to consumers").

[68] Complaint, Exhibit 2 at 7.

[69] *Id.*, Exhibit 2 at 6 (emphasis supplied).

access service, *i.e.*, data storage, manipulation, processing, and retrieval.[70] Instead, in the Tariff, DQE CNS offers only a transparent transmission path, with no changes to the form or content of the transmitted information. Specifically, DQE CNS offers only the underlying transmission (or "telecommunications") typically used by ISPs and other information service providers in the provision of retail Internet access and other data processing services to subscribers. As we found in the *Wireline Broadband Order*, "carriers may choose to offer this type of transmission as a common carrier service if they wish. In that circumstance, it is of course a telecommunications service."[71] Accordingly, DQE CNS's offering of "high speed Internet access" service provides no basis for NPTC's assertion that DQE CNS is not a "telecommunications carrier" with pole access rights under section 224(f)(1) of the Act.

4. Intrastate Carriers Such as DQE CNS Have Pole Attachment Rights Under Section 224

25. DQE CNS's Certificate of Public Convenience authorizes it to offer and provide intrastate telecommunications services as a CAP within the Commonwealth of Pennsylvania.[72] Without offering any support, NPTC argues that, because DQE CNS's authority is limited to the provision of intrastate service, DQE CNS is not an "telecommunications carrier" eligible for access to its poles under section 224(f)(1).[73] We conclude that, contrary to NPTC's assertions, section 224 provides pole attachment rights to intrastate carriers such as DQE CNS.

26. Section 224(f)(1) unambiguously provides: "A utility shall provide a cable television system or *any* telecommunications carrier with nondiscriminatory access to any pole, duct, conduit or right-of-way owned or controlled by it."[74] Moreover, section 224(b) grants the Commission broad jurisdiction over pole attachment issues, except in states that certify that they regulate such issues pursuant to section 224(c); and Pennsylvania has not so certified.[75] Further, section 2(b) of the Act explicitly recognizes the Commission's jurisdiction in connection with intrastate communication service "as provided in sections 223 through 227 . . . ."[76] In view of this plain statutory language, we conclude that DQE CNS's status as an intrastate carrier provides no basis for NPTC's assertion that DQE CNS is not a "telecommunications carrier" with pole access rights under section 224(f)(1) of the Act.[77]

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[70] Moreover, by virtue of its classification as an unregulated information service, retail Internet access service is not offered pursuant to tariff.

[71] *Wireline Broadband Order*, 20 FCC Rcd at 14910, ¶ 103.

[72] Complaint, Exhibit 1.

[73] Response at 15, ¶¶ 40-42.

[74] 47 U.S.C. § 224(f) (emphasis supplied).

[75] *Id.* at § 224(b) and (c); Complaint at 1-2, ¶ 2; Response at 2, ¶ 2. *States That Have Certified That They Regulate Pole Attachments*, Public Notice, 7 FCC Rcd 1 (1992).

[76] *See* 47 U.S.C. § 152(b). In addition, the legislative history of section 224 acknowledges that the statute "does expand the Commission's authority over entities not otherwise subject to FCC jurisdiction (such as electric power companies) and over practices of communications common carriers not otherwise subject to FCC regulation (principally the intrastate practices of interstate or intrastate telephone companies)." Reply at 3, ¶ 4, *citing* S.Rep. No. 95-580 at 15 (1978).

[77] Although NPTC failed to articulate any basis for its assertion that section 224 affords no pole attachment rights to intrastate carriers, we note that a footnote in NPTC's Response contains a single, unexplained reference to the definition of "common carrier" in section 153(10) of the Act, which provides in part, that a "'common carrier' or

(continued.…)

IV. CONCLUSION

27. For the reasons stated above, we find that (i) DQE CNS has carried its burden to establish a *prima facie* case demonstrating its entitlement to attach to NPTC's poles, and (ii) NPTC has failed to carry its burden to establish that its denial of access was lawful on the alleged ground that DQE CNS is not a "telecommunications carrier" offering or providing "telecommunications services," as those terms are defined in the Act. We therefore also conclude that DQE CNS is a "telecommunications carrier" entitled to pole attachments under section 224(f) of the Act, and grant the relief requested in the Complaint in its entirety.[78]

V. ORDERING CLAUSES

28. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 224, and sections 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 1.1401-1.1418, that the Complaint IS GRANTED.

29. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 224, and sections 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 1.1401-1.1418, that, to the extent that DQE CNS continues to seek access and attachments to NPTC's facilities, DQE CNS and NPTC SHALL PROMPTLY NEGOTIATE IN GOOD FAITH nondiscriminatory rates, terms, and conditions of access and attachments in accordance with 47 U.S.C. § 224 and the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief, Enforcement Bureau

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'carrier' means any person engaged as a common carrier for hire, in *interstate* or foreign communication by wire or radio ... except where reference is made to common carriers not subject to this Act." 47 U.S.C. § 153(10) (emphasis supplied). *See* Response at 15, ¶¶ 40-42 and n.4. We reject any implication that this definition of "common carrier" limits the reach of section 224 to "telecommunications carriers" who operate interstate. First, the definition of "telecommunications carrier" (including the related definitions of "telecommunications service" and "telecommunications") contains no limitation to providers of interstate communications. 47 U.S.C. §§ 153(44), (46), (43). Moreover, such a restrictive interpretation of the term "telecommunications carrier" as used in section 224(f)(1) would eviscerate Congress' intent to open *local* telecommunications markets to competition through the 1996 Act and would undermine the Commission's policy of encouraging facilities-based competitive entry. *See*, *e.g.*, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 16983-84, at ¶¶ 1-3 (2003) ("*Triennial Review Order*"), *corrected by Triennial Review Order Errata*, 18 FCC Rcd 19020 (2003) (subsequent history omitted).

[78] The relief granted extends to all poles, ducts, conduits and rights-of-way over which NPTC is responsible for acting on third-party requests for access, including facilities NTPC manages or controls under joint use or sharing agreements.